

93D CONGRESS
2d Session

SENATE

REPORT
No. 93-854

AMENDING THE FREEDOM OF INFORMATION ACT

MAY 16, 1974

Mr. KENNEDY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2543]

The Committee on the Judiciary, to which was referred the bill (S. 2543) to amend section 552 of title 5, commonly known as the Freedom of Information Act, having considered the same, reports favorably thereon, with amendment, and recommends that the bill do pass. Committee action on the bill was unanimous.

PURPOSE

S. 2543 would amend the Freedom of Information Act (FOIA) to facilitate freer and more expeditious public access to government information, to encourage more faithful compliance with the terms and objectives of the FOIA, to strengthen the citizen's remedy against agencies and officials who violate the Act, and to provide for closer congressional oversight of agency performance under the Act.

The committee recognizes that the meaning of the substantive exemptions in subsection (b) of the FOIA has been subject to conflicting interpretations and may not be altogether clear, but the committee has concluded that the primary obstacles to the Act's faithful implementation by the executive branch have been procedural rather than substantive. For this reason S. 2543 does not amend the substance of the exceptions to disclosure spelled out in subsection (b) of section 552, which have been clarified substantially through numerous reported court decisions.

BACKGROUND

Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the

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parties, may take further expert testimony, and may in some cases of a particularly sensitive nature decide to entertain an ex parte showing by the government.

During the pendency of a case involving documents claimed to be exempt under section 52(b) (1) the agency is entitled to a protective order sealing the contested documents and such supporting material as the judge shall determine. Upon final decision all documents ordered sealed by the court should be returned by the courts to the agency.

If an affidavit by the head of the agency is filed with the court, the affidavit should specify which information is required to be kept secret in the interest of national defense or foreign policy and explain the reasons for this conclusion. The court may allow this particularization or part thereof to be provided in camera.

Where the head of the agency has certified by affidavit his personal determination that the documents should be withheld under the criteria established by a statute or Executive order, then the court must resolve whether, in its view, the determination by the agency head is in fact a reasonable or unreasonable determination within the authority granted by the applicable statute or Executive order. The criteria referred to include both substantive and procedural criteria.

This standard of review does not allow the court to substitute its judgment for that of the agency—as under a *de novo* review—but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released.

Where particularly sensitive material is involved and so identified by the agency, the court should consider limiting access by court personnel to those obtaining appropriate security clearances. The court, where it deems appropriate, may appoint a special master who may be required by the court to obtain such security clearance as had been previously required for access to the contested documents. The government should expedite any background investigation necessary to the award of such clearances.

By statute certain special categories of sensitive information—Restricted Data (42 U.S.C. § 2162), Communication Intelligence (18 U.S.C. § 793), and Intelligence Sources and Methods (50 U.S.C. § 403 (d) (3) and (g))—must be given special protection from unauthorized disclosure. These categories of information have been exempted from public inspection under section 552(b) (3), “specifically exempted from disclosure by statute,” and (b) (1), “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.” The Committee believes that these categories of information will be adequately protected under S. 2543. If such information is ever subject to court review, the review will be conducted in camera under the procedures established in the bill for information exempt under section 552(b) (1), which has been amended to include matters specifically required to be kept secret “by an Executive Order or statute.” It is also expected that in such cases the court will recognize that such information is inherently sensitive and that

the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

The specific procedures delineated in section 552(a)(4)(B)(ii) apply only to cases where exemption (b)(1) is invoked.

It should be noted that on at least two occasions, however, the government has taken the position that the seventh exemption (subsection (b)(7) relating to disclosure of investigatory files also represents a blanket exemption where in camera inspection is unwarranted and inappropriate under the statute. (*Stern v. Richardson*, No. 179-73, D.C. Cir., Sept. 25, 1973; *Weisberg v. Department of Justice*, No. 71-1026, D.C. Cir., reargued en banc.) By expressly providing for in camera inspection regardless of the exemption invoked by the government. S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

S. 2543 also indicates that the court shall make its determination whether the requested records or files "or any part thereof may be withheld under any of the exemptions." The spokesman for the American Bar Association suggested in the hearings that "it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information." The committee believes that this requirement is understood in the basic FOIA, and the inclusion of this amendment provides authority for the court during judicial review to undertake such separation if the agency has not. (See also page Pr: presently p. 29 (new § beginning "Deletion of segregable . . .") below, concerning the government's responsibility to release documents after deletion of segregable exempt portions.)

Assessment of Attorney's Fees and Costs

S. 2543 would permit the courts to assess reasonable attorneys' fees and other litigation costs against the United States in cases where the complainant has substantially prevailed. (These fees and costs would be payable from the budget of the agency involved as party to the litigation.) Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law. "If the government had to pay legal fees each time it lost a case," observed one witness, "it would be much more careful to oppose only those areas that it had a strong chance of winning." (*Hearings*, vol. I at 211.)

The obstacle presented by litigation costs can be acute even when the press is involved. As stated by the National Newspaper Association:

An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an agency has

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1.

Director

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Attached is the Senate Judiciary Committee's report on the amendments to the Freedom of Information Act. Considering the present attitude in the Congress and the fact that this is the Kennedy bill, I think we have made a significant step toward our goal of getting special recognition for "Intelligence Sources and Methods." See clipped language incorporating the "born classified" concept.

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Acting Legislative Counsel

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